



**Digital Déjà Vu: A Road Map for Promoting  
Minority Ownership in the Wireless Industry**

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## **Dedication & Tributes to Herbert P. Wilkins, Sr.**

**This paper is dedicated to the memory of**

**Herbert P. Wilkins, Sr.**

**Longtime MMTC Board Member and Benefactor, Minority Venture Capital Icon, Mentor, and Champion for Diversity of Ownership in the Media and Telecommunications Industries**

**January 9, 1942 - December 3, 2013**

Herbert P. Wilkins, Sr., renowned venture capitalist and entrepreneur, will best be remembered for his stalwart leadership and achievements on behalf of minority entrepreneurs in the broadcast, cable, wireless and satellite industries. Affectionately known as the “Godfather of Minority Venture Capital,” Herb’s strong belief in the potential of minority businessmen and women motivated him to take risks that many others feared to take, leaving behind a legacy of success in minority-owned businesses in the communications industries. Herb revolutionized minority entrepreneurship in the broadcasting, cable, telecom and wireless industries through his successful venture capital funds, Syndicated Communications, Inc., and Syncom Venture Partners, funds that, collectively, have invested nearly a half-billion dollars in approximately 150 minority-owned communications business enterprises over the past 35 years. With a mission to diversify the ownership of media and telecom in the United States, Herb, along with his long-time partners Terry Jones, Duane McKnight and the Syncom team, adopted a winning approach by investing in deals other venture capital firms refused, and sharing the risks and rewards of their investments with other minority venture capitalists through syndication-style investments. The Syncom Funds not only made financial investments in minority entrepreneurs, but they also incubated them to help to ensure their success.

Consistent with that vision, Syncom advised and invested in major industry icons and brands that include Bob Johnson of BET Holdings, Inc. and District Cablevision; Cathy Hughes and Alfred Liggins of Radio One and TV One; Moctesuma Esparza of Buena Vista Television and Maya Cinemas; Tom Castro of El Dorado Communications; Simplink Corporation; SiTV; Amador Bustos of Z-Spanish Media Corp, and made investments in two wireless companies, Movistar (Puerto Rico) and PrimeCo Wireless Communications LLC (Chicago). Herb served on the boards of many of the companies in which Syncom invested. Notably, he served, along with cable television industry pioneer John Malone, on the board of directors of BET Holdings, Inc., helping to advise his friend and business partner Bob Johnson, who later became the first African American billionaire when BET was sold to Viacom. Herb, Bob Johnson, and former FCC Commissioner Tyrone Brown were the braintrust for BET’s future investments and would help to spawn initiatives to increase minority ownership, including the FCC tax certificate. And prior to becoming FCC Chairman, William E. Kennard was hand-selected by Herb to serve as Syncom’s primary outside counsel for a number of years. Herb’s numerous investments culminated in the acquisition of the \$6 billion Iridium Satellite Corporation as part of a team of private investors who purchased Iridium from Motorola out of bankruptcy for \$25 million, then led Iridium to a turnaround success.

Herb credited his family with his strong work ethic and entrepreneurial vision; notably, his aunt, his mother, and his father who was a master painter. Herb attended HBCU Central State University, then transferred to Boston University and graduated in 1965 with a B.A. in History. In 1968, Herb married his soulmate, Sheran, whom he often credited for his focus and success in life and business. Herb graduated from Harvard School of Business in 1970; the rest is history.

As the journey for the attainment of minority ownership continues, this paper is dedicated to Herbert P. Wilkins, Sr., a trailblazer for minority enterprise in the media and telecommunications industries, and a friend and motivator for MMTC as we advocate for equal opportunity in the communications industries.

## TRIBUTES TO HERBERT P. WILKINS, SR.

**Herbert P. Wilkins, Sr.’s life touched the lives of so many people, including the authors of this White Paper. Below, we have captured the tributes of several of his friends, mentees, and business associates. These few tributes reflect the thoughts and feelings of many others whose words could not be included.**

“At a minimum, Herb’s life is a movement that parallels the momentous rise of minority ownership of the media and telecommunications industries, and his faith in the dreams of others. The best way we can honor Herb is to continue his work of promoting minority participation in the 21<sup>st</sup> century technologies.” *Maurita Coley, Vice President and Chief Operating Officer, MMTC*

“Herb’s life epitomizes the impact that minority enterprise, when supported, celebrated, and financed, can have on a people. Herb never went into the night quietly. He would speak the truth, no holds barred. Whenever he had the podium at MMTC, he would do something no one else in the financial world could do – deliver a fiery stemwinder of an address on the urgency of establishing large minority businesses – institutions that would circulate dollars in the minority community and build real wealth. Herb’s oratorical passion was so profound that if you closed your eyes you would think Malcolm X were standing before you, reincarnated.” *David Honig, Co-founder and President, MMTC*

“Alfred and I are in existence today because of who I used to affectionately refer to as the ‘godfather’ of the broadcast industry. Herb and his partner, Terry Jones, put together our first million dollar package. If they had not believed in us, we would not be where we are today. Herb was the gatekeeper for Black entrepreneurs in the broadcast industry. He was so dedicated to opening that door wider and wider, single-handedly opening doors of entry to minority broadcast owners. Herb was a patient and firm lender, but he was so nurturing, in the way they helped us to grow. When I could not make my payments to Syncom, I pled with him to be patient with me, and I promised that I would be the largest and most successful company in his portfolio. God has blessed me to make good on that promise.” *Cathy Hughes, Co-founder, Radio One, TV One, Interactive One*

“Working with Herb for 30+ years, I can tell you unequivocally that he was a powerful and passionate force in the fight to provide capital and economic opportunity to underserved entrepreneurs throughout America, especial Blacks and Latinos. The impact of his contributions is being felt today, and will live far into the future. We are all dedicated to carry on his work...” *Terry Jones, Managing Partner, Syncom Venture Partners*

“When I first met Herb, I met ‘Herb the Icon.’ I was a young lawyer trying to break into the media business, and he was already considered an icon in both the business and venture capital worlds because of his tremendous success. When our paths crossed again, I was privileged to get to know him as ‘Herb the Businessman.’ I began working at BET in 1986, and Herb was a board member and close friend and advisor to Bob Johnson. I quickly learned two things about Herb: he had an opinion, and he wasn’t afraid to share it. I also learned that he truly took delight in investing in minority media companies and in helping them to prosper and deliver value to their shareholders....Time revealed that beneath his tough exterior was a surprisingly soft side. Herb was a big teddy bear, and for many of us he became ‘Herb the Friend.’ While he invested in our businesses financially, he invested in us personally. He mentored me, and so many other professionals, because he cared about us as individuals and wanted to see us succeed. As I worked with Herb over the years, I came to recognize him more and more as ‘Herb the Visionary.’ His influence in the Black and Hispanic media landscape is unmatched. He is in large measure responsible for the success of BET Networks and Radio One – two of the largest brands in the media space. I consider myself

fortunate to have known Herb and to have benefited from his no-nonsense approach to business. Herb was an industry icon, an extraordinary businessman, a true visionary, and a wise mentor. His influence and calculated investments in the media space will be felt long into the future. For so many, his friendship and guidance will be missed.” **Debra L. Lee, President and CEO, BET Networks**

“Mr. Wilkins will long be remembered for his consistent and deep commitment to minority entrepreneurs seeking to realize their dreams of serving communities of color and the nation. His strong belief in the unrealized potential of minority business motivated him to take risks that many others feared to take. He epitomized the maxim ‘doing well by doing good,’ and we are all enriched by the opportunities he helped to create. We are forever grateful for Mr. Wilkins’ generous spirit and sage counsel.” **Maureen Lewis, Director of Minority Telecommunications Development, National Telecommunications & Information Administration, U.S. Dept. of Commerce**

“Herb was a great friend and supporter of Bob [Johnson, Founder of BET], myself, and BET. His sense of humor and sound advice were critical in developing the first minority-owned cable network. He will be missed.” **John C. Malone, Chairman, Liberty Media**

“Herb was one of the most brilliant strategic thinkers that I ever had the pleasure of working with. He was as tough and cutting edge as they come, but strongly believed in winning the right way, and always with impeccable integrity. Herb was equally passionate about his mission of creating wealth in the minority community through business ownership and growth. He felt this could only be accomplished by bringing meaningful capital access and guidance to entrepreneurs of color to develop high growth businesses for an eventual capital gain exit event to stakeholders. These successful companies would in turn provide top executive opportunities for minority managers who in time would become the seasoned business owners of tomorrow, thus repeating and growing the ecosystem. The success of Syncom in doing its part over the last 35 years to achieve that mission is the legacy of Herb Wilkins, Sr....He will be missed.” **Duane C. McKnight, Senior Partner, Syncom Venture Partners**

“Herb Wilkins was one of the great financial geniuses of our time. Herb had the foresight to know where business opportunities existed and the expertise to help entrepreneurs succeed with those opportunities. His string of helping to develop BET, Radio One, and numerous other startup companies into major thriving businesses is unequalled. Herb spoke at numerous NABOB conferences, where he demonstrated his commitment to making African American businesses better and stronger. His dedication to that goal benefited all of us who had the opportunity to work with him and to learn from him.” **James L. Winston, Executive Director, National Association of Black Owned Broadcasters (NABOB)**

#### **A Big Man**

A BIG MAN,  
OF HIS TIMES,  
HE MADE HIS TIMES;  
INDELIBLE HIS TOUCH  
HIS ENDOWMENT ONLY CLIMBS,

A SPIRIT,  
A FORCE,  
ENTREPRENEUR BY NATURE,  
NATURE KNEW NO MATCH,  
LEGIONS ARE HIS SOURCE,

HERB,  
MEMORY WILL NOT FAIL,  
YOU ARE NOT GONE,  
BUT BRINGING HELL  
TO HEAVEN;  
BLAZING SOME NEW TRAIL.

*Additional tributes by BET Deputy General Counsel Lawrence Cooper; Hogan Lovells Partner Ari Fitzgerald; Greystone Partners Managing Partner Kenneth O. Harris; Radio One, TV One, and Interactive One Co-founder Alfred Liggins; and former Broadcast Capital Fund President John Oxendine are available online at [mmtconline.org](http://mmtconline.org) and [bbsj.org](http://bbsj.org).*

**Frank Washington, Entrepreneur and Attorney**

# Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry

S. Jenell Trigg, Esq.<sup>‡</sup>  
Jeneba Jalloh Ghatt, Esq.<sup>†</sup>

## Executive Summary

With incentive auctions projected to generate billions in revenue in the near future, the inclusion of MBEs in the communications sector – as licensees and ultimately as facilities-based spectrum owners – is vital to fulfilling the promise of innovation, competition, universal deployment, and other advanced wireless services that are transforming the nation. As the wireless industry continues to be an essential element of the nation’s economic growth, the aspiration to own and operate the assets that enable and empower this industry holds profound importance to minority-owned business enterprises (“MBEs”), and the people and communities they represent.

When Congress first authorized the Federal Communications Commission (“FCC” or “Commission”) to allocate scarce public radiofrequency spectrum via competitive bidding (auctions) in Section 309(j) of the Communications Act in 1993, they mandated that the agency promote the participation of small, MBE and women-owned business enterprises (“WBEs”) and rural telephone companies (collectively known as “Designated Entities” or “DEs”), avoid excessive concentration of licenses, and disseminate licenses among a wide variety of applicants.

Despite the statutory mandate to promote MBE and WBE participation in spectrum auctions, however, the FCC’s Designated Entity (“DE”) Program has been largely ineffective. Over the course of fifty-six wireless auctions during the past 20 years, the majority of DEs that currently hold wireless licenses are incumbent rural telephone companies, very few DEs are new entrants, and even fewer DEs are MBEs. Without a change in policy and current rules and regulations, the outlook for expanded minority participation remains dismal.

This paper explores the history and obstacles that have hampered MBE (and WBE) inclusion as wireless spectrum licensees, and presents the following *nine* public policy recommendations to assist the FCC in facilitating measureable improvement in DE participation in upcoming auctions.

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1. Eliminate the *Attributable Material Relationship Rule*. DEs should be able to retain their DE status, including the value of bidding credits, without having to attribute the revenues of other firms (large or small) if they enter into leasing, wholesaling, and/or resale arrangements for more than 25% of spectrum capacity to one entity.
2. Increase bidding credits to at least 40%. An increase would help compensate for the harms caused by the 2006 DE Rules and counterbalance concentrated license ownership.
3. Reinstitute select DE-only closed spectrum auctions. Doing so would level the playing field for DEs against large incumbents and well-financed new market entrants.
4. Incorporate diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions ("M&As") and secondary market spectrum transactions. Such analysis would ensure that there are compelling factors in the determination of whether any transaction meets the public interest standard, including MBE and WBE participation. Such documentation should also be a part of the agency's annual Wireless Competition Report to Congress.
5. Conduct ongoing recordkeeping of DE performance. The Commission should retain specific information about the MBE and WBE status of bidders, in addition to the small business status, to accurately measure auction outcomes.
6. Complete the *Adarand* Studies, updating the Section 257 studies released in 2000. These studies should specifically detail market failures as defined by Section 257, and should include a comprehensive review of the successes or failures of the DE program as well as race-neutral measures to implement Section 309(j) since its inception.
7. Regularize procedural requirements. Such action would ensure that future regulatory and policy changes are conducted with ample time for public notice and comment, with outreach to all types of DEs to ascertain the real-world impact of such changes.
8. Conduct a substantive review of proposed DE rules. Such review would include an analysis of potential market entry barriers and of significant economic impacts on DEs for auction rules at the NPRM stage of the rulemaking process.
9. Support increased funding for and statutory amendments regarding the Telecommunications Development Fund. Reinvigoration and reactivation of TDF can help support today's DEs, especially MBEs and WBEs, by providing financing consultation for auction participants, and support for and/or partnership with producing the FCC's *Adarand* studies required to meet constitutional strict scrutiny requirements.

**This paper proposes recommendations #1, #2 and #4 as the highest priorities to ensure that MBEs are included in wireless spectrum ownership expeditiously.**

Due to marketplace dynamics, long-standing market entry barriers and discriminatory practices, compounded by regulatory and legal impediments, MBE ownership of full power radio and TV stations is at its lowest in decades, and the number of MBE-owned cable systems is negligible, at best. Adopting the recommendations in this paper will help ensure that the FCC does not continue to contribute to a similarly discouraging outcome in the wireless industry.

# Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry

S. Jenell Trigg, Esq. and  
Jeneba Jalloh Ghatt, Esq.

## I. Introduction

*“[B]roadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.”<sup>1</sup>*

When Congress first created the Federal Communications Commission (“FCC” or “Commission”) to regulate the nation’s radiofrequency spectrum nearly 80 years ago, lawmakers recognized that the public had an ownership interest in the airwaves. When it created the FCC, Congress therefore required that it serve the public interest, convenience, and necessity in its duties and in allocation of this scarce public resource.<sup>2</sup>

In 1993, Congress amended the Communications Act to grant the FCC authority to conduct competitive bidding (auctions) as a more efficient and expedient means to allocate new licenses.<sup>3</sup> Congress also recognized that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, “Designated Entities” or “DEs”) faced longstanding market entry barriers such as access to capital due to discriminatory practices in equity and debt markets.<sup>4</sup> Therefore, Section 309(j) of the amended Communications Act required the FCC to

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<sup>1</sup> FCC, *Connecting America: The National Broadband Plan*, rel. Mar. 16, 2000, at Executive Summary p. xi.

<sup>2</sup> 47 U.S.C. §§151 and 309(a). These sections of the Communications Act of 1934, as amended (the “Communications Act”) provide a foundation for all FCC rules and policy.

<sup>3</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §6002 (codified at 47 U.S.C. §309(j)).

<sup>4</sup> *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, Report, 12 FCC Rcd 16802, 16824-46 ¶¶35-81 (1997); see also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5537-38 ¶¶11 (1994) (“*Fifth R&O*”).



“promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, *and businesses owned by members of minority groups and women.*”<sup>5</sup>

Congress created these provisions out of the concern that DEs could easily be priced out of auctions because they would have to compete directly with incumbents that were often large, well capitalized, entrenched and experienced communications companies. At that time, Congress asserted that “unless the Commission [was] sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.”<sup>6</sup>

The FCC shared this concern, and adopted regulations to create auction rules, noting that “although auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services.”<sup>7</sup> The Commission also recognized that the “primary impediment to [auction] participation by designated entities”<sup>8</sup> was their inability to secure and retain access to capital to participate. When Congress amended Section 309(j) years later, it specifically required the Commission to analyze the impact of certain changes on “the ability of small businesses and new entrants to participate effectively in the bidding process.”<sup>9</sup>

The FCC started off the first decade of its auction authority by implementing a variety of congressionally-approved tools and regulatory initiatives to promote participation by minority-owned

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<sup>5</sup> 47 U.S.C. §309(j)(3)(B) (emphasis added).

<sup>6</sup> H.R. REP. NO. 103-111, at 254 (1993).

<sup>7</sup> *Fifth R&O* at 5537 ¶10.

<sup>8</sup> *Id.*

<sup>9</sup> Balanced Budget Act of 1997, H.R. REP. NO. 105-217, at 572 (1997).

business enterprises (“MBEs”), such as tax certificates, installment payment plans and special closed auctions for DEs only. Over a ten-year span, more than 1,400 small businesses, including MBEs, won spectrum licenses as a result of the competitive bidding process. In recent years, however, the FCC’s DE program has become ineffective following the agency’s gradual repeal and elimination of previously existing incentives to encourage MBE participation, legal impediments, the further expansion of large incumbents, the elimination of rules and policies that limited the amount of spectrum licensed to one entity, and the impact of the FCC’s own regulatory missteps – well-intended or not.

Over the course of fifty-six wireless auctions during the past 20 years, the majority of DEs that currently hold wireless licenses are incumbent rural telephone companies, very few DEs are new entrants, and even fewer DEs are MBEs. Without a change in policy and current rules and regulations, the outlook for increased minority participation remains dismal. Moreover, the Commission’s weak track record on promoting diversity will continue to disadvantage MBEs.

This paper argues that the inclusion of MBEs in the wireless communications sector – as licensees and ultimately as facilities-based spectrum owners, not just service providers or mobile application developers – is vital to fulfilling the promise of innovation, competition, universal deployment, and other advanced wireless services that are transforming the nation. The value of the incentive auctions to the nation’s economy cannot be overstated as the auctions (along with other measures to enable more efficient spectrum management) could generate nearly \$28 billion in revenue over ten years.<sup>10</sup> The FCC has also planned to auction additional advanced services spectrum in the near future, such as AWS-3 and 600 MHz spectrum blocks, raising the potential opportunities for new services and new entrants considerably.

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<sup>10</sup> See White House Report on the Economic Benefits of New Spectrum for Wireless Broadband at pp. 1-25.

Moreover, as the wireless industry continues to be an essential element of the nation's economic growth, the aspiration to own and operate the assets that enable and empower this leading industry holds profound importance to MBEs, and the people and communities they represent.

America needs to be poised to face an increasing shift to a majority-minority population – a massive demographic transition that is already starting to reshape our country.<sup>11</sup> Consequently, the recent shift in mobile broadband use by people of color should not be alarming. According to Pew, more people of color rely more heavily on their cell phones for Internet access. Among cell-mostly Internet users, 43% are Black, Non-Hispanic and 60% are Hispanic, while overall 34% of all users are cell-mostly Internet users.<sup>12</sup> Other demographic characteristics are that people in this group tend to be young (18-29 age group, less educated, (45% of cell Internet users have a high school diploma or less) and less affluent.<sup>13</sup> Reports on mobile broadband use also show that more people of color use their cell/smartphones for broadband-enabled activities like application downloading. Sixty-percent of African Americans and 52% of Hispanic Americans fall into this category as compared to 50% of all cell phone owners.<sup>14</sup> There is also a rising trend toward exclusive mobile device usage. The National Telecommunications Information Administration (“NTIA”) reports that 5% of Hispanic and African Americans are using the Internet on mobile devices only, as compared to only 3% of all Internet users.<sup>15</sup>

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<sup>11</sup> See, e.g., William H. Frey, *Shift to a Majority-Minority Population in the U.S. Happening Faster than Expected*, Brookings (June 19, 2013), available at <http://www.brookings.edu/blogs/up-front/posts/2013/06/19-us-majority-minority-population-census-frey> (last visited Feb. 5, 2014).

<sup>12</sup> See Maeve Duggan and Aaron Smith, *Cell Internet Use 2013*, Pew Research Center (Sept. 16, 2013), p. 9, available at [http://pewinternet.org/~media/Files/Reports/2013/PIP\\_CellInternetUse2013.pdf](http://pewinternet.org/~media/Files/Reports/2013/PIP_CellInternetUse2013.pdf) (last visited Feb. 14, 2014).

<sup>13</sup> See *id.*

<sup>14</sup> See Maeve Duggan, *Cell Phone Activities 2013*, PewResearchCenter (Sept. 16, 2013), p. 7, available at [http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP\\_Cell%20Phone%20Activities%20May%202013.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Cell%20Phone%20Activities%20May%202013.pdf) (last visited Feb. 14, 2014).

<sup>15</sup> See NTIA and ESA, *Exploring the Digital Nation: America's Emerging Online Experience*, U.S. Department of Commerce (June 2013), p. 19, available at [http://www.ntia.doc.gov/files/ntia/publications/exploring\\_the\\_digital\\_nation\\_-\\_americas\\_emerging\\_online\\_experience.pdf](http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf) (last visited Feb. 14, 2014).

Wireless-only household use is also increasing among communities of color. Compared to national wireless-only household use measured at 36%, Hispanics and African Americans are at 47% and 38% respectively.<sup>16</sup>

While the growth in mobile use among consumers of color is beginning to narrow disparities in access and use, the challenge of building significant spectrum ownership among members of under-represented groups still persists. In addition to being wireless consumers, it is vital for MBEs to have opportunities to be producers – by owning and controlling public infrastructure-related resources such as wireless licenses.

Section one of this paper demonstrates how the FCC's DE program, when supported and enforced, led to more robust MBE participation in spectrum auctions. The second section outlines how certain legal developments, in addition to rule and policy changes adopted by the FCC degraded the program's effectiveness, thus leading to fewer MBE licensees. The remainder of the paper proffers that investments in secondary market transactions and integration of diversity goals in public interest standards could serve to remedy the disparate representation by MBEs, with the paper concluding with *nine* immediate, practical policy recommendations to make possible meaningful levels of MBE participation in commercial wireless entrepreneurship.

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<sup>16</sup> See Stephen Blumberg and Julian Luke, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2012, National Center for Health Statistics (2012), pp. 1, 3, available <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.PDF> (last visited Feb. 14, 2014).

## II. The Declining Trajectory of MBE Participation in Spectrum Auctions, 1996 to the Present

When the wireless industry was still in its infancy, MBEs had a unique opportunity to enter the industry on the ground floor, unlike MBEs engaged in terrestrial broadcasting.<sup>17</sup> In some ways due to the creation of new communications services, the wireless industry avoided the history of discrimination present in the broadcasting industry that hampered the ability for new entrants, especially MBEs. Unfortunately, other forms of discrimination against MBEs regarding access to capital have carried through to the new industry.<sup>18</sup>

Congress enumerated various initiatives for the FCC to consider promoting the participation of DEs, such as “tax certificates, bidding preferences, and other procedures.”<sup>19</sup> Congress also prohibited the

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<sup>17</sup> The first minority owned radio station signed on in 1949, and the first minority-owned TV station signed on in 1973 - well after many of the more valuable licenses had been allocated to non-minority entities due to discriminatory practices by state and federal governments, and policies that were favorable to non-minority owned newspapers and incumbents. See Antoinette Cook Bush and Marc S. Martin, *The FCC's Minority Ownership Policies from Broadcasting to PCS*, 48 Fed. Comm. L.J. 423, 424-439 (1996) (“Bush and Martin”). Today, MBE ownership levels of full power radio and TV stations are at their lowest in decades. See Jeffrey Layne Blevins, *The Death of Diversity in U.S. Broadcast Ownership*, City Beat (Jan. 15, 2014) (providing an overview of policies that led to the demise of MBE ownership). As of the final draft of this White Paper, there are only three African American-owned full power television stations. Oxford Media Group, Inc., licensee of WJYS in Hammond, Indiana, is majority owned by Joseph A. Stroud. See Application for Renewal of Broadcast Station License, File No. BRCDDT-20130401ATZ (March 2011). Armstrong Williams, recently purchased two stations from the Sinclair Broadcast Group, Inc., WEYI-TV in Flint, Michigan and WWMB in Myrtle Beach, South Carolina, through his company Howard Stirk Holdings, LLC. See Naeem Mcfadden, *Williams finalizes ownership of television stations*, Star & Enterprise (Nov. 11, 2013) available at: [http://www.scnow.com/starandenterprise/news/article\\_24b1f88e-4c6c-11e3-9b45-001a4bcf6878.html](http://www.scnow.com/starandenterprise/news/article_24b1f88e-4c6c-11e3-9b45-001a4bcf6878.html) (last visited Feb 19, 2014).

<sup>18</sup> One of the five (5) FCC-commissioned Section 257 studies released in December 2000 was “Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes” by William D. Bradford, Ph.D., endowed Professor of Business and Economic Development and Professor of Finance, School of Business Administration, University of Washington, December 5, 2000. The *FCC Capital Market Discrimination Study* summarized that businesses owned by minorities and women face statistically significant differences in the likelihood of winning in spectrum auctions compared to other participants due to historical and continuing discrimination in private and institutional debt capital markets. *Id.* at ix. The Study’s results suggest that “without a remedy for capital market discrimination, minority- and women-owned business are inappropriately disadvantaged in obtaining FCC broadcast and wireless licenses.” *Id.* at 3. In 2004, the FCC reissued all of its Section 257 Studies for further public comment. See *Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, FCC Public Notice, 19 FCC Rcd 10491 (June 15, 2004). The FCC has not yet acted in this proceeding.

<sup>19</sup> 47 U.S.C. §309(j)(4)(D).

FCC from taking into account potential auction revenue when crafting auction rules and procedures.<sup>20</sup> As a result, bidding credits have always been an essential part of the program.<sup>21</sup> To fully implement Section 309(j) and “take the steps that are necessary to *ensure that designated entities have a realistic opportunity* to obtain [spectrum] licenses,”<sup>22</sup> the FCC adopted several classifications of Designated Entities. These were defined as small and very small businesses, MBEs and WBEs, rural telephone companies,<sup>23</sup> and entrepreneurs.<sup>24</sup> To incentivize MBEs and WBEs and help compensate for historical discrimination in the capital markets, the FCC, on its own initiative, also provided additional bidding credits to MBEs and WBEs<sup>25</sup> and allowed the payment for licenses in installments over a longer period of time and at a lower interest rate.<sup>26</sup> These actions, in addition to FCC hosted DE-only auctions, served to mobilize DE participation and representation.<sup>27</sup>

In its early years, the DE program had been very successful in introducing diverse new entrants as a result of the FCC’s favorable rules and policies. In the first 10 years of the FCC DE program, 1,435 firms meeting the FCC small business criteria, including MBEs, won licenses.<sup>28</sup> A summary of some of those successes are outlined below:

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<sup>20</sup> See 47 U.S.C. §309(j)(7)(A).

<sup>21</sup> Bidding credits are “a discount on the bid price a [DE] firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities.” *Fifth R & O* at 5590 ¶132. “[T]he use of bidding credits in auctions would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of those services. *Id.* at 5589 ¶130.

<sup>22</sup> *Fifth R & O* at 5537 ¶9 (emphasis added).

<sup>23</sup> 47 C.F.R. §1.2110.

<sup>24</sup> *Id.*

<sup>25</sup> See *Fifth R & O* at 5539 ¶15.

<sup>26</sup> See *id.* at 5539 ¶16.

<sup>27</sup> See *id.* at 5580 ¶113 (employing a range of methods to promote DE participation, including “closed” auctions for specific spectrum blocks, installment payment plans, tax certificates and reduced upfront payments). As Congress repealed the tax certificate in March 1995, three months prior to the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, it was never an effective incentive for MBE entry into wireless.

<sup>28</sup> See Gregory Rose and Mark Lloyd, *The Failure of FCC Spectrum Auctions*, Center for American Progress (2006), p. 19-20 (“*Center for American Progress Report*”) (analyzing the FCC spectrum auction winners and losers). DEs also secured a significant share of the net value of winning bids in the above auctions, illustrating that



- In Auction 5, PCS C Block, 89 entrepreneurs acquired 493 licenses;
- In Auction 10, PCS C Block re-auction, 7 small businesses acquired 18 licenses;
- In Auction 11, PCS D, E, and F Blocks, 93 small businesses won 598 licenses;
- In Auction 14, WCS, 8 small businesses acquired 32 licenses; and
- In Auction 22, PCS, 48 small businesses acquired 277 licenses.<sup>29</sup>

Measured by the net value of licenses won, DE participation in spectrum auctions was over 70% in a total of six commercial mobile radio service auctions from 1996 to 2005.<sup>30</sup>

Notwithstanding the large number of DE winners in the first few years of auctions, some commenter's have criticized the DE program for its failure to increase competition or serve the public interest citing to the outcome of the FCC's Personal Communications Services ("PCS") C block Auction #5 in 1996.<sup>31</sup> Such arguments conveniently ignore the numerous circumstances, many outside of DE control, that impacted the outcome of C block, including several problems caused by the FCC.

A comparison of the PCS Broadband auctions dating back to 1994 is set out below to shed light on the program's criticism. The PCS Broadband service was designed to be auctioned in six spectrum blocks and the A & B blocks were scheduled first.<sup>32</sup> Compared to the 255 entities in the C block bidder pool, the A and B block Auction #4 completed in 1995, for example, contained only 30 bidders which were dominated by the well-financed incumbent telephony, paging, cellular and cable providers and/or strategic coalitions of such incumbents. The differences between the two auctions could not be more significant.

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DEs did not just win a lot of small and leftover markets. DEs won the following in net value: Auction 5 - \$10,071 Million (100%); Auction 10 - \$905 Million (100%); Auction 11 - \$761 Million (30%); Auction 14 - \$2 Million (17%); and Auction 22 - \$390 Million (94%). Revenue calculations based on FCC auction factsheet and summary databases, available at [http://wireless.fcc.gov/auctions/default.htm?job=auctions\\_home](http://wireless.fcc.gov/auctions/default.htm?job=auctions_home) (last visited Feb. 15, 2014).

<sup>29</sup> *Id.*

<sup>30</sup> *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert. denied sub nom. Council Tree Investors, Inc. v. FCC*, 131 S. Ct. 1784 (2011).

<sup>31</sup> See, e.g. Fred Campbell, *Maximizing the Success of the Incentive Auction* (Nov. 4, 2013), p. 3-10 (research prepared for the Expanding Opportunities for Broadcasters Coalition and Consumer Electronics Association).

<sup>32</sup> *Fifth R&O*, at 5535-36 ¶¶ 6-7. The C and F blocks were closed auctions, exclusively for DEs. *Id.* at 5538 ¶12.

The C block bidder pool represented a 750% percent increase over the number of bidders for A and B blocks, and consisted entirely of small, MBE, WBE, and entrepreneur entities - new entrants in wireless. As the U.S. Small Business Administration noted at the time, “[t]he absence of such traditional telecommunications providers in C block could have facilitated the vigorous competition not present in A and B [blocks] – resulting in higher bids for C.”<sup>33</sup>

The saga of the C block began with multiple delays. Litigation (and the threat of litigation) delayed its start, and following the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña* in June 1995, the FCC had to change the DE rules to eliminate any race-based and gender-based classifications.<sup>34</sup> Significant delays hampered the ability of small and minority-owned businesses and new entrants to raise capital and construct networks in a timely manner, especially given the fact that existing carriers, including those who were winners of A and B block, cellular, and Specialized Mobile Radio licenses, had a head start.<sup>35</sup>

NextWave Personal Communications, Inc. was the single largest auction winner in C block with \$4.74 billion in winning net bids for 63 licenses. The FCC’s evaluation of NextWave’s PCS applications compounded the already precarious start to C block. The FCC did not complete its review and grant

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<sup>33</sup> Letter to FCC Chairman Reed Hundt from Jere W. Glover and S. Jenell Trigg, Office of Advocacy, U.S. Small Business Administration, WT Docket No. 97-82, Sept. 8, 1997 at 2 (addressing the various issues related to C block and offering recommendations for the FCC’s restructuring efforts.) (“Advocacy FCC Letter”). “Even though D-F [block] prices were on the average less than C, several BTAs in D and E blocks *exceeded* C block bids in the amount bid and price per pop – for less spectrum. Does this mean that C block bids, in those particular markets, were too low or, alternatively, that the D and E bids were excessive?” (emphasis in original) (footnotes omitted). *Id.* In 1998-1999, the value of the C block licenses significantly increased in value, but many DEs, as new entrants, were not able to sustain holding onto the licenses during the telecommunications market downturn in 1995-1997. Patrick S. Ryan, *The court as a spectrum regulator: will there be a European analogue to U.S. cases NextWave and GWI?*, 4 German L.J., 149, 157 (2003), [http://germanlawjournal.com/pdfs/Vol04No02/PDF\\_Vol\\_04\\_No\\_02\\_149-167\\_European\\_Ryan.pdf](http://germanlawjournal.com/pdfs/Vol04No02/PDF_Vol_04_No_02_149-167_European_Ryan.pdf) (last visited Feb. 14, 2014).

<sup>34</sup> See Bush and Martin, *supra* n. 17, at 423-433.

<sup>35</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order*, 11 FCC Rcd 136, 140 ¶6 (1995) (“*Sixth R&O*”), *aff’d sub nom. Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (citations omitted) (cautioning that further delay of the C block auction, even to supplement the administrative record to meet the strict scrutiny standard of review required by *Adarand* [*infra* note 64] would put C block winners at a greater competitive disadvantage in the CMRS market compared to incumbents).

NextWave PCS's applications for eight months because it had to first respond to various petitions to deny filed against NextWave alleging ownership and structural violations.<sup>36</sup> The NextWave delay impacted other successful and qualified winners in basic trading areas ("BTAs") contiguous with NextWave. Many DEs could not construct with NextWave's applications in limbo. Equipment and other vendors needed to configure the dominant winner's network and technology but could not with NextWave's application unresolved. And without NextWave's confirmation on its transmission technology and specifics, vendors were also hesitant to confirm orders or agreements for other DE winners. Further, large incumbent providers and those who won A and B block licenses were reluctant to enter into reasonable roaming agreements with the upstart new entrants in the C block. NextWave, which won bids in contiguous BTAs to many winning DEs, was initially a small business new entrant's best option. During the FCC's delay in granting NextWave's licenses, the market value of PCS licenses declined significantly and NextWave tried unsuccessfully to reduce its \$3.72 billion debt to \$1.02 billion.<sup>37</sup> NextWave subsequently filed for bankruptcy in 1998 primarily due to difficulty in raising capital in time for the next installment payment due date.<sup>38</sup> Unfortunately, NextWave was not alone.

In an effort to prevent another default or bankruptcy, the Wireless Telecommunications Bureau suspended all bidding payments the day they were due.<sup>39</sup> Although well intended, this action cast a negative stigma on all DE winners of C block (and other auctions), even those experienced DEs that made

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<sup>36</sup> *Wireless Telecommunications Bureau Announces Conditional Grant of Broadband Personal Communications Services Entrepreneurs' C Block Licenses to NextWave Personal Communications, Inc.*, FCC Public Notice, DA 97-12 (Jan. 3, 1997). See also *In re Applications of NextWave Personal Communications, Inc. for various C-Block PCS Licenses*, Order, 12 FCC Rcd 2030 (1997).

<sup>37</sup> See *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 298 (2003) (citations omitted). Note that another DE, General Wireless Inc., was successful in a different court to significantly reduce its principal balance due to the FCC. *Ryan Article* at 158-9 (allowing GWI to avoid approximately \$894 million of its initial \$954 million obligation to the FCC). The financial markets were not kind to DEs still trying to raise capital in light of this significant loss of PCS C block value.

<sup>38</sup> See *id* at 297.

<sup>39</sup> *In re Installment Payments for FCC Licenses*, DA 97-649, Order, 12 FCC Rcd 17325 (1997).

their installment payments on time and were ready to construct.<sup>40</sup> Not only was the valuable capital of those DEs tied up with the FCC indefinitely but equipment and other vendors imposed additional terms and requested significant upfront deposits and/or engineering studies even for those DEs not in financial distress.<sup>41</sup> As a result, C and F block winners had to spend more time and money to catch up to the significant head start that A and B block winners enjoyed. In short, the success of the PCS C and F blocks were doomed before the FCC's restructuring efforts were completed.

Those winning DEs in C and F blocks that survived the compounded impact of the numerous stays, negative press, overbroad criticism of inexperience and overpaying, loss of investors, protracted NextWave litigation, and FCC regulatory actions, went on to construct and offer innovative pricing and services. For example, Cook Inlet Region, Inc. ("CIRI"),<sup>42</sup> Chase Telecommunications, Inc. ("ChaseTel"),<sup>43</sup> and TriCo Wireless PCS, Inc. ("TriCo"),<sup>44</sup> all MBEs, were successful DEs. While these

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<sup>40</sup> See Advocacy FCC Letter at 3-4 (citations omitted). In essence, the FCC acted as both a creditor and regulator, which resulted in an inherent conflict of interest to the detriment of DEs. See *id.*

<sup>41</sup> *Id.*

<sup>42</sup> A subsidiary company of CIRI, an Alaska Regional Corporation organized under the Alaska Native Claims Settlement Act, 47 U.S.C. §§1601 *et seq.*, was one of the first and few DE PCS block winners to build out. It launched services in the Tulsa, Oklahoma BTA in partnership with Western Wireless. CIRI was acquired by predecessor companies to T-Mobile USA. Without CIRI and its substantial independent footprint, T-Mobile and the aggressive competition T-Mobile provides would not exist today.

<sup>43</sup> The major principal in ChaseTel was Anthony R. Chase, an experienced African American entrepreneur with extensive investments in broadcasting and wireless. ChaseTel was a winning bidder in C block and constructed operations in Tennessee. ChaseTel was a partner with Qualcomm Inc. and deployed its service using QUALCOMM's wireless infrastructure and CDMA digital technologies. QUALCOMM ultimately purchased ChaseTel's licenses and initiated its Leap service,

<sup>44</sup> The principal owner of TriCo was Richard L. Vega, Sr., an experienced wireless operator of Hispanic ethnicity. TriCo was a small and minority-owned business and its predecessor companies (also owned by Vega) were the successful winners of C, D, and F block licenses in underserved and unserved BTAs located in Minnesota, West Virginia, and Missouri. TriCo exceeded its 5-year and 10 year construction benchmarks in the Duluth, Minnesota and St. Joseph, Missouri BTAs. TriCo strategically selected BTAs where the larger incumbent national providers had ignored and focused instead of serving those communities as a "neighborhood" provider. TriCo secured investments from several minority-owned or targeted private equity providers including Opportunity Capital Partners, Pacesetter Capital, Fleet Development Ventures, and Fulcrum Venture Capital Corporation, but it needed to secure more capital to operate, advertise on the retail market, and pay its installment payments to the FCC. It invested more than a year to unsuccessfully secure a loan from the Rural Utility Service, but the application process was not favorable to non-incumbent rural telcos. TriCo sought a waiver or suspension of its installment payments for select licenses given the collapse of the financial markets after September 11, 2001 to provide additional time to

DEs ultimately sold to larger companies, a standard exit strategy for new entrants that received private equity support, their legacy endures in the form of innovative pricing and services offered by T-Mobile, Leap,<sup>45</sup> and Nsighttel Wireless, each with origins as DEs. Notwithstanding the C block saga, the FCC still reported that a significant number of MBE DEs participated in the auctions.<sup>46</sup> This limited success in promoting DEs as facilities-based providers might have been exponentially greater if the C block had been auctioned first.

### **III. The FCC Adopted Rule Changes that Hampered New Entrant DE Participation**

Similar to their actions in the C block saga, the FCC continued to dismantle the positive gains from early auctions when it made material changes to its long standing DE eligibility rules. This happened just days before the short form application deadline for the Advanced Wireless Services auction, Auction 66, in 2006. The FCC took an approach that conflicted with its historic concern for, and tangible efforts to help, DEs secure capital, particularly in the auction context. Ultimately, the U.S. Court of Appeals for the Third Circuit vacated two of the three new rules the Commission adopted that year, with the Court

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prosecute its RUS application. It ultimately filed for bankruptcy. TriCo sold its licenses to several different companies, including Nsighttel Wireless, LLC, a subsidiary of Northeast Communications of Wisconsin, Inc. Nsighttel Wireless has retained TriCo's focus as a local and community-based service provider in Duluth.

<sup>45</sup> Qualcomm's spinoff Leap Wireless successfully launched Cricket Wireless, a revolutionary wireless company that provides affordable wireless services to a wide range of customers, without credit checks or long-term commitments, and in particular those in urban markets and inner cities. Leap Wireless International (LEAP) February 2009, Securities Exchange Commission Filing, 10K [http://www.wikininvest.com/stock/Leap\\_Wireless\\_International\\_\(LEAP\)/Cricket\\_Business\\_Strategy](http://www.wikininvest.com/stock/Leap_Wireless_International_(LEAP)/Cricket_Business_Strategy) (last visited Feb. 5, 2014). See also Leap Wireless: Who We Are, available at <http://www.leapwireless.com/who-we-are/wireless-industry> (last visited Feb. 15, 2014) (Leap was founded on September 23, 1998 as a spin off of Qualcomm to advance its vision "to provide affordable wireless services to a wide range of customers). Cricket has added a competitive edge to the industry with its disruptive business model. At this writing, AT&T is in the process of acquiring Leap.

<sup>46</sup> See FCC News, *Wireless Bureau Chief Daniel Phythyon Hails Success of Market-Based Spectrum Policies* (Sept. 11, 1997) (noting that "to date 80% of license winners in FCC spectrum auctions are small businesses, 22% of which are minority-owned and 18% woman-owned.")

citing “serious” violations of the Administrative Procedure Act’s public notice and comment requirements.<sup>47</sup>

The FCC also enacted a number of rules that hampered, if not negated DE participation. Notably, the FCC doubled the “*post-auction unjust enrichment penalty repayment period*” from five to ten years (“*Unjust Enrichment Rule*”),<sup>48</sup> the time auction winners had to maintain the same ownership before assessed a penalty. The agency also imposed a 100% bid credit repayment obligation (plus interest) on licensees that sold their interest in their licenses during the first five years after winning an auction.<sup>49</sup> The FCC also stripped DE eligibility status altogether from any entity that leased or resold (including on a wholesale basis) more than 50% of the aggregate spectrum capacity won at auction (“*Impermissible Relationship Rule*”).<sup>50</sup> The new change in the 50% rule forced start-up DEs to compete immediately with entrenched incumbents on a retail, direct-to-the-public basis. The *Attributable Material Relationship Rule* impacted a DE’s ability to enter into lease, wholesale, and resale arrangements with any one entity for more than 25% of the DE’s spectrum capacity by making the gross revenue of that entity (and if applicable, its total assets), as well as the controlling interests, affiliates, and affiliates of the controlling

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<sup>47</sup> *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 258 (3d Cir. 2010) (subsequent history omitted). The court also expressed serious concern as to the substantive lawfulness of both the *Impermissible Relationship and the Unjust Enrichment Rules*. The court “note[d] that the FCC does not appear to have thoroughly considered the impact of the extended [ten year] repayment schedule on DEs’ ability to retain financing.” *Id.* at 255 n. 8. It further found that the Commission was “confused” about “the maximum period for which investors are willing to lock up their capital (before being able to liquidate the spectrum license, in the event the DE proves unprofitable) . . . . *Id.* Likewise, the court criticized the agency’s “inattention to the nature of the wireless wholesaling business,” in which a DE would “build and operate” new, wireless transmission facilities and then sell that new capacity to other existing companies, thereby promoting competition. *Id.*

<sup>48</sup> 47 C.F.R. §1.2111(d)(2)(i) (2006) (vacated 2010). *See also In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures et al.* 27 FCC Rcd 908 (2012). The five year unjust enrichment period had been adopted after an extensive notice and comment rulemaking in 1994. *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Third Report and Order, 9 FCC Rcd 2941, 2975-76 ¶80 (1994).

<sup>49</sup> 47 C.F.R. §1.2111(d)(2)(i) (2006) (vacated in part, 2010). *See also In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures et al.* 27 FCC Rcd 908 (2012).

<sup>50</sup> 47 C.F.R. §1.2110(b)(3)(iv)(A) (2006) (vacated 2010). *See also In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures et al.* 27 FCC Rcd 908 (2012).



interests of that entity, attributable to the DE.<sup>51</sup> As shown below, the effects were both detrimental and immediate.

DEs planning to participate in Auction 66 lost financial sources that had been cultivated for more than a year due to the regulatory uncertainty and unreasonable restrictions the new rules placed on financial markets. New entrant DEs seeking to become facilities-based providers (but via wholesale or leasing arrangements) had to completely revise or abandon their business plans. The damaging DE Rules were also in place for the next major broadband auction, Auction 73. With Auction 73, the FCC planned to auction off 700 MHz licenses reallocated from broadcasters. This portion of the airwaves was considered especially valuable spectrum and dubbed “beachfront” property. Many DEs, however, were not able to recover after Auction 66 and did not participate in Auction 73.<sup>52</sup> As a result, both Auctions 66 and 73 showed a precipitous drop in DE participation from the average 70% value of winning bids over previous years, to only 4.0% and 2.6%, respectively.<sup>53</sup> Although DEs won 20% of Auction 66 licenses and 35% of Auction 73 licenses, the licenses were mostly for small markets.<sup>54</sup> Moreover, rural telcos dominated as the more successful DEs, and there were few new entrants, especially MBEs, in Auction 73. Despite the lack of meaningful bidding competition from new entrant DEs, the underlying value of the spectrum offered in Auctions 66 and 73 generated nearly \$14 billion and \$19 billion in revenues, respectively. DEs won only a little over \$500 million in each auction.

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<sup>51</sup> 47 C.F.R. §1.2110(b)(3)(iv)(B) (2006).

<sup>52</sup> Many DEs supported the petitioners in the Council Tree litigation as amicus curiae. Many were not able to participate in either Auction 66 or Auction 73. (Over the years they included Antares Holding, LLC, Arizona Hispanic Newswire LLC, Business Intelligence Solutions, Dempster Group, LLC, Faithfone Wireless, Inc., Kinex Networking Solutions, Inc., OVTC, Inc., Rocking “R” International, Inc., Wirefree Partners, LLC, Xanadoo 700 MHz DE, LLC, in addition to several individuals who were principals in DEs that were no longer in business). For example, the 2006 DE Rules restriction on leasing, reselling and wholesaling plus the imposition of a much longer unjust enrichment period prevented Wirefree from participating in any further auctions. Previously, it won 16 wireless licenses for which it paid \$150 million.

<sup>53</sup> *Council Tree*, 619 F.3d at 248.

<sup>54</sup> For example, in Auction 73, the 70 most valuable licenses yielded 80% of the auction’s total revenue (\$15.2 billion). DEs acquired *none* of these licenses.

In contrast, the largest incumbent providers won the rights to the bulk of the most valuable licenses. In Auction 73, AT&T and Verizon Wireless captured an aggregated 84.4% of the total value.<sup>55</sup> Ten years prior to the 2006 DE Rules, barely more than 10% of bidders in any auction were routinely able to acquire 50% or more of the available licenses.<sup>56</sup> These results directly contravened the key Section 309(j) congressional mandates that direct the FCC to design auctions so as to *promote* DE participation and *avoid* excessive concentration of licenses.<sup>57</sup> In fact, the detrimental changes the FCC made in its 2006 revised designated entity rules rapidly ushered in the conditions that Congress feared in the transition to competitive bidding.

Between the completion of Auction 66 and the start of Auction 73, the FCC had advance warning of the negative practical impact of its rule changes on small businesses, yet it did nothing to reverse course.<sup>58</sup> Such inaction on the DE rule changes enabled the two largest incumbent wireless companies to dominate Auction 73. The rule changes were detrimental not only to small businesses and new entrants, but also to both competition in the mobile wireless marketplace and the public that relies on mobile services. Today, the consequences of the 2006 rule changes still reverberate strongly in a wireless

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<sup>55</sup> See Saul Hansell, *Verizon and AT&T Win Big in Auction of Spectrum*, N.Y. TIMES (Mar. 21, 2008), available at <http://www.nytimes.com/2008/03/21/technology/21auction.html> (last visited Feb. 5, 2014) (“The two largest cellphone service providers – Verizon Wireless and AT&T – won a greater swath of radio spectrum in the government auction that ended this week, heading off new competition that could have led to lower prices for consumers.”).

<sup>56</sup> *Center for American Progress Report*, *supra* note 28 at 7.

<sup>57</sup> “[C]onsistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services...” 47 U.S.C. §309(j)(4)(C).

<sup>58</sup> See, e.g., *Comments of Office of Advocacy, U.S. Small Business Administration*, WT Docket No. 06-150 *et al.*, (May 21, 2007), p. 2 (“Because the revisions made to the FCC’s ‘designated entity’ (‘DE’) rules have encumbered small business participation in auctions, we recommend that the FCC stay these rules for the 700 MHz auction and rely instead upon the original DE rules.”)

marketplace dominated by large incumbent carriers in which the FCC and the United States Department of Justice are struggling to foster healthy competition.<sup>59</sup>

Concerns about the declining participation of MBEs continued into 2009. The FCC's Diversity Advisory Committee's Telecom and Broadband Issues Subcommittee presented the visualization below of the devastating impact of the 2006 DE Rules:<sup>60</sup>

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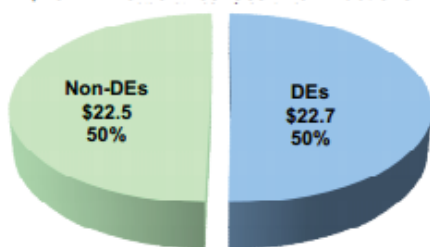
<sup>59</sup> See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile, Wireless, Including Commercial Mobile Services*, Sixteenth Report, 28 FCC Rcd 3700, 3736 ¶26 and 3763 ¶70 (2013) ("16th Annual Mobile Competition Report").

<sup>60</sup> FCC Advisory Committee on Diversity for Communications in a Digital Age Telecom and Broadband Issues Subcommittee, *Proposal to Restore the FCC's Designated Entity ("DE") Program*, (Sept. 14, 2009), available at <http://transition.fcc.gov/DiversityFAC/092209/broadband-sub-proposal-de.pdf> (last visited Feb. 6, 2014). The Diversity Advisory Committee also issued a resolution to rescind the *Unjust Enrichment, Impermissible Relationship and Attributable Material Relationship Rules*. *Id.* at Appendix I.

- **RESULT: DE Auction Success Has Declined to Near-Zero (Net Winning Bids, \$ in billions)**

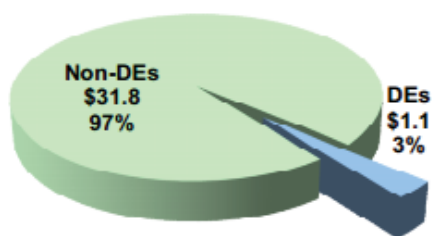
**BEFORE DE Rule Change: 1994 – April 2006**

\$45.2 Billion of Licenses in 64 Auctions



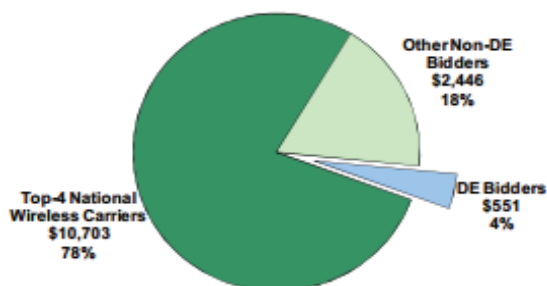
**AFTER DE Rule Change: April 2006 – 2008**

\$32.8 Billion of Licenses, Principally Auctions 66 / 73

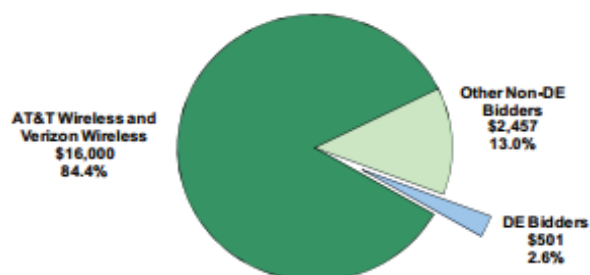


- **The New DE Rules, Along with No Closed Auctions, Have Resulted In DE Auction Success Declining to Near Zero**

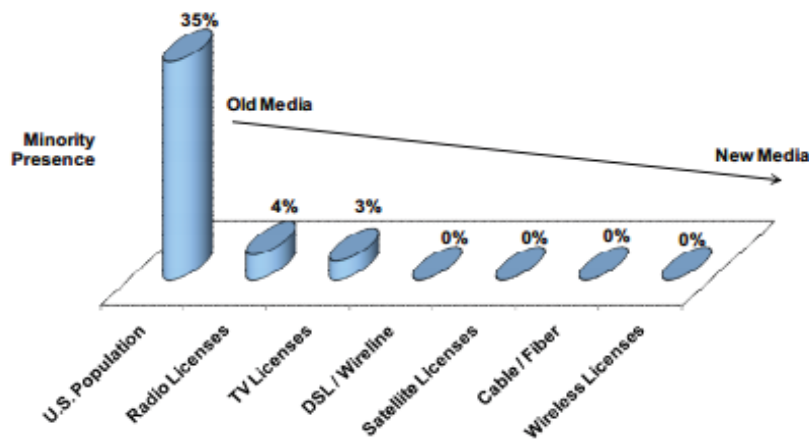
DE Participation in Auction 66  
By Winning Net Bids (in \$ millions)



DE Participation in Auction 73  
By Winning Net Bids (in \$ millions)



- **Eliminating DE Competition Only Worsened the Near Total Absence of Minority Ownership**  
(data rounded to nearest whole number)



Individual FCC Commissioners also took note of the impact of the FCC’s failure to address harmful DE rules. Reviewing the abysmal results of Auction 73, former Commissioner Jonathan Adelstein noted that “women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses, or .64%).”<sup>61</sup> This result, according to former Commissioner Adelstein, was inexcusable considering “*that women constitute over half the U.S. population and minorities around one-third of the U.S. population.*”<sup>62</sup> Commissioner Adelstein’s remarks below also captured the frustration of many when he lamented that:

It’s appalling that women and minorities were virtually shut out of this monumental auction. It’s an outrage that we’ve failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. Here we had an enormous opportunity to open the airwaves to a new generation that reflects the diversity of America, and instead we just made a bad situation even worse. This gives whole new meaning to “white spaces” in the spectrum.<sup>63</sup>

#### **IV. *Adarand* and DE Program Administration**

In June 1995, the U.S. Supreme Court handed down its decision in *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995). *Adarand* mandated that all federal race-based programs, even those designed to benefit racial and ethnic minorities, must meet the standard of strict scrutiny review requiring a compelling governmental interest and narrowly tailored to meet that interest.<sup>64</sup> After the decision, the FCC reevaluated all of its regulations in all industries and changed its minority- and gender-based classifications for auctions to a race-neutral small business, revenue-based size standard in order to avoid

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<sup>61</sup> Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction, FCC News Release (Mar. 20, 2008).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); see also S. Jenell Trigg, *The Federal Communications Commission’s Equal Opportunity Employment Program and the Effect of Adarand Constructors Inc. v. Peña*, 4 CommLaw Conspectus 237 (1996).

protracted litigation.<sup>65</sup> The FCC justified this change with the rationale that many minority- and women-owned businesses would also be small. The Commission stated it could still meet its statutory requirements under Section 309 (j) without further delay and litigation, writing, “elimination of the race- and gender-based measures . . . would be consistent with our duty to implement the Budget Act, since we believe that many designated entities would qualify as small businesses under our rules.”<sup>66</sup> Some parties challenged the FCC’s decision to change the standard to a race-neutral, small business classification, but the FCC ultimately prevailed.<sup>67</sup>

Just months after the *Adarand* decision, the Telecommunications Act of 1996 (“1996 Act”) became law.<sup>68</sup> This landmark legislation ushered in an unprecedented level of market disruption allowing vertical integration of telecommunications services and consolidation. During the deliberations prior to passage of the 1996 Act, certain members of Congress were concerned that the “big business” bill would have detrimental impacts on small businesses, especially minority- and women-owned businesses. In a statement after its passage, former Congresswoman Cardiss L. Collins stated:

[W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country’s maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely underrepresented in the telecommunications field.<sup>69</sup>

Given this concern, but wary of the Supreme Court’s decision in *Adarand* and Congress’ anti-affirmative action stance, the negotiations leading up to the 1996 Act added two provisions designed to promote “small business.” Section 257, on Market Entry Barriers (codified at 47 U. S. C. § 257), and

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<sup>65</sup> See generally *Sixth R&O*, *supra* note 35. Although gender-based programs were subject to a lower degree of scrutiny, the FCC also eliminated its gender-based rules as a precaution. See *id.*

<sup>66</sup> *Sixth R&O* at 141 ¶8.

<sup>67</sup> See generally *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996).

<sup>68</sup> Pub. L. No. 104–104, 110 Stat. 56 (1996).

<sup>69</sup> 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Cardiss L. Collins, sponsor of Section 257).



Section 714, on the Telecommunications Development Fund (codified at 47 U. S. C. § 614), were adopted with the promise that each would help small businesses compete in the newly configured telecommunications arena.<sup>70</sup> Section 257 mandates that the FCC identify and eliminate market entry barriers, and release a triennial report to Congress on its efforts.<sup>71</sup> The Telecommunications Development Fund (“TDF”), *inter alia*, was designed to provide both debt and equity capital for small telecommunications businesses.<sup>72</sup> Regrettably, neither provision has lived up to its promise to promote MBEs in the wireless industry in any meaningful way.

In short, the “small business” provisions have been largely ineffective, and the Section 257 requirement is merely an obligation to study the industry every three years and issue a report to Congress.<sup>73</sup> In practice, Section 257 has not operated as a mandate to resolve major market barriers or market failure.<sup>74</sup> And given the relatively small amount of capital that it had to invest, the TDF was limited in the types and number of transactions that it selected and could not help new entrant MBEs.<sup>75</sup>

Today’s political climate has also stirred proposals to terminate and/or defund the TDF on the grounds that it is ineffective and redundant. Opponents claim that “[t]he fund has not demonstrated significant success in meeting its statutory goals, and its efforts overlap with several other Federal

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<sup>70</sup> See S. Jenell Trigg, *Section 714 – The Telecommunications Development Fund: Making a Difference?* in *The Success and Failure of the 1996 Telecommunications Act* 191 (Civil Rights Forum on Communications Policy, ed., 2002) (“Trigg TDF Article”).

<sup>71</sup> See, e.g., David Honig and Moushumi Khan, *Section 257- Eliminating Market Entry Barriers: The Best New Hope for Diversity and Inclusion*, in *The Success and Failure of the 1996 Telecommunications Act* 153, 156-57 (Civil Rights Forum on Communications Policy, ed., 2002).

<sup>72</sup> See Trigg TDF Article at 199-200.

<sup>73</sup> See *Comcast Corporation v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010).

<sup>74</sup> See *id.*

<sup>75</sup> TDF did not provide debt financing because of its statutory requirements to make loans in accordance with the provisions of the Federal Credit Reform Act of 1990. Trigg TDF Article at 200 (citations omitted). TDF explained that most start-ups do not have sufficient collateral or assets to qualify for the credit-worthy loans. *Id.*

programs and the private sector.”<sup>76</sup> Notwithstanding the purported issues with the TDF, it has been SBA loan programs that have not fulfilled the need for financing wireless providers, especially for auctions. Nor is the TDF’s statutory mandate to “stimulate new technology development, and promote employment and training; and to support universal service and promote delivery of telecommunications services to underserved rural and urban areas”<sup>77</sup> duplicative of the FCC Universal Service Fund (“USF”). The TDF supports the entry of new service providers that can reach unserved or underserved communities where there are few, if any, incumbent providers; the USF provides funding to providers to help offset the high cost of delivering telecommunications services. The two serve distinctly different, yet essential purposes.

## **V. The FCC’s Failed DE Program Undermines MBEs, Communities and Competition**

The theme of the DE Program could well be that “[t]hose who cannot remember the past, are condemned to repeat it.”<sup>78</sup> The FCC’s missteps, in particular the impact of last minute rule changes that negatively affected a DE’s ability to raise capital, have served to eviscerate the DE program at a time when MBE ownership is more important than ever before. The ability of MBEs to compete represents the growing shift in the country’s demographics and the resounding need to ensure that minorities are producers in this industry. Despite a slight shift from explicit discriminatory business practices, structural and legal limitations still exist for MBEs. MBEs still experience significant barriers to participate in our economy and in FCC-regulated industries,<sup>79</sup> often due to limited access to “patient capital,”<sup>80</sup> the presence

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<sup>76</sup> 112 Congress, Concurrent Resolution on the Budget - Fiscal Year 2012 at 80, Gov’t Printing Office (April 11, 2011).

<sup>77</sup> 47 U.S.C. §§614(a)(2) and (3).

<sup>78</sup> George Santayana, Reason in Common Sense, Vol. 1 of The Life of Reason (emphasis added).

<sup>79</sup> In 2007 of 27.1 million businesses in the United States, there were 1.9 million African American owned businesses, 2.3 million were Hispanic American owned businesses, and 7.8 million women-owned businesses. SBA Office of Advocacy, Frequently Asked Questions (Sept. 2012), p. 2, available at [http://www.sba.gov/sites/default/files/FAQ\\_Sept\\_2012.pdf](http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf) (last visited Feb. 5, 2014). In the communications arena, MWBEs have significant known barriers to entry. See, e.g., United States Government Accountability Office, Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and

of discrimination in deal flow, financing and construction, and the lingering negative effects of past discrimination. In addition to the increasingly precarious position that MBEs and entrepreneurs occupy in the capital-intensive mobile broadband sector, MBEs also have to contend with a widening racial wealth gap, educational disparities, and an opportunity divide.<sup>81</sup>

With the stakes this high, the FCC should do more to provide realistic opportunities for MBEs to compete in the wireless industry. While prior FCC decisions served to undermine the goals of diversity and inclusion, the aspiration for a more inclusive and representative marketplace should be an achievable goal for the FCC, particularly those decisions and programs that serve to boost competition, foster innovation, provide mobile services to underserved and unserved communities,<sup>82</sup> and stimulate job growth in underemployed communities. More broadly, discussed below are three economic incentives for swift action:

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Commerce, Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to Assess (March 2008), available at <http://www.gao.gov/assets/280/273671.pdf> (last visited Feb. 5, 2014).

<sup>80</sup> “Patient capital” is a financial investment that provides sufficient time and support for an entity to grow the business, and does not require a relatively quick sale of the business to capture a return on investment. To attract patient capital, the regulatory environment needs to be stable and allow a business flexibility to address new developments in market conditions and/or compete on the same level as other entities in its industry. The FCC was very much concerned about the stability of the regulatory process and the impact on the financial and investment community when it restructured C block, remarking that “[t]hese elements [*i.e.*, maintaining the integrity for future auctions and ensuring that all participants are treated fairly and impartially] are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.” *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16436, 16438 ¶3 (1997).

<sup>81</sup> See Reply Comments of the Minority Media and Telecommunications Council, *State of Mobile Wireless Competition*, WT Docket No. 13-135 (July 25, 2013) at 5.

<sup>82</sup> “Most notably, 2.5 million more people living in rural areas, who did not have access to any mobile broad service broadband in August of 2010, now benefit from this service . . . . Unfortunately, it appears that over the same two year period, more people living in rural areas have two or fewer options for mobile voice service . . . that figure has increased to approximately 7.7 million. Despite the billions invested on mobile networks each year, I must say that it is disappointing to see 400,000 Americans still lacking access to any mobile service option.” Statement of Commissioner Mignon L. Clyburn, Re: *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services*, *supra* note 59, at 4035.

## 1. MBEs Contribute Significantly to the National Economy and Promote Local Economic Development.

The U.S. Department of Commerce's Minority Business Development Agency ("MBDA"), for example, has illustrated the value that MBEs generally add to U.S. economic output.<sup>83</sup> Using Census data, the MBDA found that, as a result of a rapidly growing minority population, MBEs annually contribute \$1 trillion to U.S. aggregate economic output. MBEs are also more likely than non-minority-owned businesses to export and conduct business in a language other than English.<sup>84</sup> MBEs also regularly invest in communities that other companies overlook or underserve.<sup>85</sup> These facts are evidenced by the fact that MBE employment continues to grow even as overall employment declines.<sup>86</sup> The MBDA has also noted how minority business development actually enhances innovation. A 2010 MBDA report stated:

Barriers to entry and expansion faced by MBEs are very costly to U.S. productivity, especially as minorities represent an increasing share of the total population ... by limiting the business success to only a few groups and not the broad range of diverse groups that comprise the United States we are constraining innovative ideas for new products and services, and access to global markets where many minority entrepreneurs have a competitive advantage based on cultural knowledge, social and familial ties, and language capabilities.<sup>87</sup>

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<sup>83</sup> See U.S. Department of Commerce, Minority Business Development Agency, U.S. Business Fact Sheet, available at <http://www.mbda.gov/sites/default/files/MinorityOwnedFirmsLeadExportsFinal.pdf> ("MBDA Fact Sheet") (last visited Feb. 5, 2014).

<sup>84</sup> See *id.*

<sup>85</sup> *Id.*

<sup>86</sup> See Robert W. Fairlie, Ph.D. and Alicia M. Robb, Ph.D., Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs, U.S. Department of Commerce, Minority Business Development Agency (Jan. 2010), p. 12 ("MBDA 2010 Disparities in Capital Report") ("For all minority-owned firms, employment increased by 4 percent between 1997 and 2002. In contrast, total employment actually declined by 7 percent among non-minority firms from 1997 to 2002. *If not for employment growth among minority-owned firms over this period the loss in total employment would have been even larger: an additional 160,000 jobs would have been lost.*"). Further, between 2002 and 2007, the number of minority owned businesses increased more than two times the national rate. See Census Bureau Reports Minority Business Ownership Increasing at More than Twice the National Rate, Census Bureau News Release (July 13, 2010), available at [http://www.census.gov/newsroom/releases/archives/economic\\_census/cb10-107.html](http://www.census.gov/newsroom/releases/archives/economic_census/cb10-107.html) (last visited Feb. 5, 2014).

<sup>87</sup> See MBDA 2010 Disparities in Capital Report at 8.

## 2. Continued Discriminatory Practices Have an Economic Cost.

As observed by U.S. Senator Kirsten E. Gillibrand, promoting the talent of women and minority businesses and the next generation of entrepreneurs is critical to U.S. economic recovery.<sup>88</sup> Limiting inherent entrepreneurial, managerial, creative, and innovative skills based on race or gender restricts competition, GDP, and economic growth. Economist Andrew F. Brimmer,<sup>89</sup> calculated the cost that racial discrimination placed on our economy in billions of dollars – and that was 20 years ago.<sup>90</sup> For example, the failure to fully utilize the existing skills of African Americans and the failure to improve education for African Americans costs the U.S. billions of dollars in societal growth.<sup>91</sup> As a result, racial discrimination cost our nation approximately 3.8% of our GDP or \$241 billion in 1993.<sup>92</sup> In 2002, former FCC Chairman Kevin Martin asserted the positive relationship between diversity and competition:

By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved

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<sup>88</sup> See, e.g., U.S. Senator Kirsten E. Gillibrand, A Guide to Women and Minority-Owned Business Funding Opportunities (2013), p. 5, available at <http://www.gillibrand.senate.gov> (search for “A Guide to Women and Minority-Owned Business Funding Opportunities”) (last visited Feb. 5, 2014) (“America’s economic recovery will, in part rest on our ability to unlock the economic potential of women and minority entrepreneurs. If we can promote the talent of women and minority business leaders and foster the success of a new generation of entrepreneurs, then America’s economy will be stronger than ever. Today, there are nearly 20 million women and minority-owned businesses in the United States. During these difficult economic times, the costs of doing business can sometimes become a tremendous burden for our entrepreneurs and small business owners, particularly for women and minority owners that continue to face unfair disadvantages.”)

<sup>89</sup> See Stephanie Strom, Andrew Brimmer, First Black Member on Fed Board, Dies at 86, New York Times (Oct. 12, 2012), available at <http://www.nytimes.com/2012/10/12/business/andrew-brimmer-first-black-on-fed-board-dies-at-86.html> (last visited Feb. 5, 2014).

<sup>90</sup> See, e.g., Andrew F. Brimmer, *The Economic Cost of Discrimination Against Black Americans*, in *Economic Perspectives on Affirmative Action*, Joint Center for Political and Economic Studies (Margaret C. Simms ed., 1995).

<sup>91</sup> See *id.* at 12-13.

<sup>92</sup> See *id.* at 11-12. “[F]or many years, the U.S. Postal Service employed thousands of black men with college degrees in mathematics, chemistry, and other sciences who could not find jobs in the private sector.... Even today, despite the lessening of restrictions because of equal opportunity laws and the spread of affirmative action practices in industry, many blacks are still concentrated in positions that do not make full use of their talents. If racial discrimination were to be eliminated, blacks could migrate more freely from low to high productivity occupations where their contribution to total production would be increased. The result would be a gain in the nation’s total output of goods and services.” *Id.* at 13.

programming, which ultimately benefits all consumers. The [EEO] program we adopt today therefore should promote not just diversity, but also true competition.<sup>93</sup>

### **3. MBEs Can Contribute to Workforce Development Opportunities for Women and Other Minorities.**

A more robust array of MBEs operating in this industry could deliver a range of new opportunities for the underemployed and unemployed. In the broadband era, much emphasis has been placed on the importance of entrepreneurship and global competitiveness in fostering our nation's growth.<sup>94</sup> The presence of more MBEs could boost competition and would benefit consumers, particularly those in traditionally underserved communities.<sup>95</sup> Entrepreneurs often serve niche markets.<sup>96</sup> Entry by entrepreneurs into niche markets allows these startups to address the service needs that are often left unmet by larger incumbent carriers. The absence of larger carriers in many unserved and underserved markets provides an opportunity for entry for entrepreneurs who could not otherwise afford to directly compete with incumbents that have established retail and distribution channels, large marketing and advertising budgets, and existing subscriber bases. In addition to benefiting diverse communities, MBEs also provide an avenue to boost diverse competition by recruiting, hiring, and developing minority and women employees.

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<sup>93</sup> See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report & Order and Third NPRM*, 17 FCC Rcd 24018 (2002) (Separate Statement of Commissioner Kevin J. Martin).

<sup>94</sup> See, e.g., Remarks of FCC Chairman, Julius Genachowski, U.S. Chamber of Commerce (Oct. 14, 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-310395A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310395A1.pdf) (last visited Feb. 5, 2014) (delivering remarks on how broadband innovation is enabling opportunities and increasing competitiveness).

<sup>95</sup> See, e.g., Reply Comments of MVNO Association, WT Docket No. 13-135 (July 15, 2013). See also Wireless Telecommunications Bureau Seeks Further Comment on the State of Mobile Wireless Competition and the Role of Minority and Women-Owned Business Enterprises and Extends Period for Reply Comments, Public Notice, 28 FCC Rcd 9125 (July 1, 2013) (The Commission seeks comment on whether "MWBEs provide services to consumers who might otherwise be overlooked by others in the marketplace").

<sup>96</sup> See, e.g., Larry Myler, *The Two-Step Method For Finding Your Entrepreneurial Niche*, Forbes (April 23, 2013), available at <http://www.forbes.com/sites/larrymyler/2013/04/23/the-two-step-method-for-finding-your-entrepreneurial-niche/> (last visited Feb. 5, 2014).



Because wireless has become the new broadcasting medium (with increasing news, information and entertainment content), MBE firms inject sorely needed competition into the burgeoning wireless markets by offering new and niche services.<sup>97</sup>

## **VI. The Importance of Secondary Market Transactions to MBE Participation**

While many MBEs have entered the wireless industry via the FCC's DE program, MBE growth into sizeable institutions will depend on their ability to access spectrum through the secondary market. Secondary market transactions are those in which an operator gains access to spectrum through private commercial transactions. While access to capital remains a major obstacle, some MBEs have been successful in raising large sums of capital to acquire spectrum on the secondary market, especially when the seller actively seeks DE or MBE participation.<sup>98</sup> MBEs can raise significant capital when regulatory

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<sup>97</sup> See Applications of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC For Consent to Assign and Lease AWS-1 and Lower 700 MHz Licenses, Memorandum Opinion and Order, 28 FCC Rcd 12878, 12905 ¶66 (Sept. 3, 2013). See also *Section 257 Triennial Report to Congress, Identifying and Eliminating, Market Entry Barriers, For Entrepreneurs and Other, Small Businesses, Report*, 26 FCC Rcd 2909, 2912 ¶5 (2011) ("The Commission fully recognizes the role that small communications businesses play in a robust American economy. Our efforts ... evidence the Commission's commitment to identifying and reducing or eliminating barriers that would impede the growth of such a vital sector of the industry and the economy.")

<sup>98</sup> For example, in 1999, when seeking merger approval SBC and Ameritech spun off properties in overlapping wireless phone licensing markets to a group of sellers that included minority billionaire Chester Davenport who managed Georgetown Partners, a Bethesda, Maryland private investment firm. See Seth Schiesel, *Ameritech to Sell Half of Wireless Business to GTE*, New York Times (April 6, 1999), available at <http://www.nytimes.com/1999/04/06/business/ameritech-to-sell-half-of-wireless-business-to-gte.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fT%2fTelephones%20and%20Telecommunications> (last visited Feb. 5, 2014). Davenport's company contributed \$60 million towards the \$3.3 billion purchase price of the company that eventually acquired the properties once held by Ameritech. In the end, Davenport owned a 7% stake in the spinoff company.

Steven R. Bradley, an African American entrepreneur with paging, cellular and PCS wireless experience, organized an experienced management team and raised over \$900 million through a consortium of private equity firms, including JP Morgan Capital Corp., The Carlyle Group, Arlington Capital and several minority-owned private equity firms to acquire then-Bell Atlantic's divested PCS licenses in Chicago, Illinois, and in Cincinnati, Ohio. See Lynette Luna, *New wireless operator picks up Verizon's divested properties*, RCR Wireless (Aug. 21, 2000), available at <http://www.rcrwireless.com/article/20000821/sub/new-wireless-operator-picks-up-verizons-divested-properties/> (last visited Feb. 5, 2014) ("Luna RCR Article"); see also *Investor Group Agrees to Acquire Wireless Businesses From Affiliates Of Verizon Communications*, Civic Partners (Aug. 17, 2000), available at <http://www.civc.com/news/archive/2000/000817.html> (last visited Feb. 5, 2014).



barriers are few. In 2013, for example, wireless business pioneer, David Grain, completed the largest minority spectrum acquisition valued at \$287 million involving large incumbents Verizon Wireless and AT&T.<sup>99</sup>

Dating as far back as 2003, the FCC broadened opportunities for secondary market transactions by permitting licensees to lease their licensed spectrum to third parties, in an effort to achieve “more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country.”<sup>100</sup> In fact, the FCC lauded its secondary markets initiatives as a major accomplishment in its Section 257 Triennial Report to Congress in 2003, stating that the changes helped “further the ability of licensees and entities that seek to gain access to spectrum, including entrepreneurs and small businesses, to enter into arrangements best suited [to] the parties’ respective needs and business models.”<sup>101</sup>

Unfortunately, the FCC undermined much of the flexibility provided to DEs in secondary market transactions when it adopted the *Attributable Material Relationship* and *Impermissible Relationship Rules*

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Bradley was the principal in FirstCall Telephone and Integrated Communications Group. ICG was a successful winner of the PCS C and F Block auctions. At the time, the initial deal was the largest-ever minority equity investment in a telecom acquisition, “supported by well in excess of \$100 million in minority private equity and almost triple the previous percentage level of the minority investment made in GTE’s buy of Ameritech wireless properties last year.” Luna RCR Article. The FCC approved the transaction, however, the deal fell apart at the last minute due to an issue with Deutsche Bank Securities, Inc., the debt provider. See Jon Van, *Deadline looms to divest PrimeCo*, Chicago Tribune (June 20, 2001) available at [http://articles.chicagotribune.com/2001-06-20/business/0106200246\\_1\\_primeco-pcs-verizon-communications-wireless-license](http://articles.chicagotribune.com/2001-06-20/business/0106200246_1_primeco-pcs-verizon-communications-wireless-license) (last visited Feb. 5, 2014). A new consortium, PrimeCo Acquisition LLC, also organized by Bradley, ultimately acquired the Chicago MTA license in 2001. The minority-owned private equity was approximately \$55 Million in a \$460 million transaction and included investments by Opportunity Capital Partners, Syndicated Communications, Fairview Capital Partners, and Green Leaf Ridge Company.

<sup>99</sup> In September 2012, the FCC granted the Grain Spectrum, LLC and Grain Spectrum II, LLC (collectively, Grain Spectrum) applications to assign and lease a number of Lower 700 MHz Band B Block and full advanced wireless services licenses from Verizon Wireless and AT&T. In making its decision, the FCC determined that the transaction would meet its Section 257 obligation to further its “goal of extending opportunities in the wireless market to small and minority-owned businesses.” *In re Applications of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC and Grain Spectrum II, LLC For Consent To Assign and Lease AWS-1 and Lower 700 MHz Licenses*, Order, 28 FCC Rcd 12878, 12905 ¶65 (September 3, 2013).

<sup>100</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604, 20607 ¶2 (2003) (“*Secondary Markets Report and Order*”).

<sup>101</sup> *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business, Report*, 19 FCC Rcd 3034, 3081-82 ¶156 (2003) (emphasis added).

in 2006. Although the *Impermissible Relationship Rule* was vacated by the Third Circuit, the *Attributable Material Relationship Rule* was upheld and, as previously discussed, continues to handicap DEs in the development of viable business plans and relationships that are standard industry business practices and provides needed capital and revenue to DEs, while still serving the public.

Spectrum leasing arrangements are also a vital component of business models utilized by MBEs. These provide increased access to capital, which in turn helps firms become facilities-based competitors – a goal shared by the FCC.<sup>102</sup> Ironically, under the FCC’s existing *Attributable Material Relationship* rule, MBEs are prohibited from entering into leasing arrangements for more than 25% of spectrum capacity with larger entities if they seek to establish or retain DE status. This is inconsistent with the FCC’s previous findings in its Secondary Markets proceeding that leasing by a designated entity of “*substantially all of the spectrum capacity of the licensee*” with an entity that the DE has a prior business relationship with would cause attribution likely leading to a loss of eligibility.<sup>103</sup> The existing restrictions in the DE Rules are puzzling given that the FCC itself has recognized that spectrum leasing agreements with other licensees “will help achieve another of our goals, namely ensuring that many small businesses have significant opportunities to provide spectrum based services . . . and [will] enable [DEs] . . . to access additional capital through leasing arrangements that can be used to build out their networks.”<sup>104</sup> In today’s wireless market, wholesaling has become an important business model given the dominance of larger incumbents in the retail market.

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<sup>102</sup> *Secondary Markets Report & Order* at 20607 ¶2 (“Facilitating the development of these secondary markets enhances and complements several of the Commission’s major policy initiatives and public interest objectives, including our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition amongst service providers, enhance economic opportunities and access for the provision of communications services by designated entities, and enable development of additional and innovative services in rural areas.”)

<sup>103</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Second Report and Order, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17541-42 ¶77 (2004) (emphasis added).

<sup>104</sup> *Secondary Markets Report & Order* at 20626 ¶45.

The secondary markets policy also helps the FCC meet its obligation to promote efficient spectrum use of a scarce commodity among a wide range of competitors, including MBEs. Promotion and extension of this initiative without discriminatory limitations on leasing and wholesaling by DEs is one of several steps the FCC can take to renew its dismantled DE program. Greater opportunities for DEs in secondary market transactions should also be encouraged attendant to mergers or acquisitions.<sup>105</sup> These major transactions should incorporate diverse partnerships and demonstrate genuine consideration of diversity and inclusion. To that end, such measures should be an imperative in 2014.

As activity peaks in the wireless industry, especially around mergers and acquisitions, the FCC should put its best effort forward to ensure that diversity and inclusion are more compelling factors in their determination of whether any transaction meets the public interest standard. Similar to other industry verticals, wireless mergers ultimately impact media diversity given that smartphones and other mobile technology deliver news, information and educational content. Media ownership within the burgeoning sectors of the media and telecommunications industries – radio, broadcast, cable and satellite, is still a pressing policy concern. In his tenure as a Senator, President Barack Obama was very supportive of bold FCC action to further diversity in the broadcasting industry, having declared at that time that:

[i]t is time to put together an independent panel . . . to issue a specific proposal for furthering the goal of diversity in media ownership. I object to the agency moving forward to allow greater consolidation in the media market without first fully understanding how that would limit opportunities for minority, small business, and women owned firms.<sup>106</sup>

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<sup>105</sup> There have been a large number of mergers and acquisitions in the telecommunications industry over the past two years, including Softbank/Sprint and T-Mobile/MetroPCS. See, e.g., Cecilia Kang, *FCC approves T-Mobile merger with MetroPCS*, Wash. Post (March 12, 2013) available at [http://www.washingtonpost.com/business/technology/fcc-approves-t-mobile-merger-with-metro-pcs/2013/03/12/cbef2330-8b3b-11e2-9838-d62f083ba93f\\_print.html](http://www.washingtonpost.com/business/technology/fcc-approves-t-mobile-merger-with-metro-pcs/2013/03/12/cbef2330-8b3b-11e2-9838-d62f083ba93f_print.html) (last visited Feb. 5, 2014). There have been an even greater number of transactions involving the sale of major spectrum portfolios. As we move into 2014, several industry-shaping transactions are currently before the FCC, including Verizon Wireless' sale of A block licenses to T-Mobile and AT&T's proposed acquisitions of Aloha and Leap, respectively. See Public Knowledge, *AT&T Buying Leap Wireless Would Be a Bad Deal for Consumers, Competition, and Vulnerable Populations*, July 12, 2013; see also Andrea Chang, *AT&T to acquire Leap Wireless in a \$1.2-billion deal*, Los Angeles Times (July 12, 2013) available at <http://articles.latimes.com/2013/jul/12/business/la-fi-att-leap-20130713> (last visited Feb. 6, 2014).

<sup>106</sup> John Eggerton, *Obama Calls on Martin to Slow Down on Ownership Review*, Broadcasting & Cable (Oct. 22, 2001) available at <http://www.broadcastingcable.com/news/washington/obama-calls-martin-slow-down-ownership->

In fact, the President was then supportive of legislation that required the FCC to create an independent panel on increasing the representation of women and minorities in broadcast media ownership and to act on the panel's recommendations before voting on any changes to its broadcast and newspaper ownership rules.<sup>107</sup>

Strategic partnerships between DEs and larger companies can be very effective in bringing wireless services to underserved and unserved communities, especially in an expedited manner, and the FCC has been supportive of such relationships in the past.<sup>108</sup> Such relationships are not *per se* detrimental to diversity or serve to undermine the DE program or auction process. Just because a DE may expand the service offerings of an incumbent communications provider does not mean that the DE has any less value, less integrity, less control, or is providing less service to the public. For example, African American family-owned Wilco Electronic Systems, Inc. is a cable provider that provides voice, 4G broadband, and cable video services to low income communities in Philadelphia, Pennsylvania.<sup>109</sup> Wilco offers 4G broadband service provided by Clear, a subsidiary of Sprint, in partnership with Mobile Citizen, a non-

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review/54090 (last visited Feb. 5, 2014) (reporting on letter from Senator Barack Obama to FCC Chairman Kevin J. Martin).

<sup>107</sup> Then-Senator Barack Obama was a co-sponsor of S.2322, Media Ownership Act of 2007. Section 2 “Requires the FCC to establish an independent panel on increasing the representation of women and minorities in broadcast media ownership and to act on the panel's recommendations before voting on any changes to its broadcast and newspaper ownership rules [and] requires the FCC to provide the panel, before the panel makes any recommendation to the FCC: (1) a full census of the race and gender of individuals holding a controlling interest in broadcast stations; and (2) a study of the impact of media market concentration on the representation of women and minorities in the ownership of broadcast media.” S. 2332 CRS Summary, Bill Summary & Status, 110<sup>th</sup> Congress (2007-2008).

<sup>108</sup> See, e.g., *Fifth R&O*, *supra* note 4 at 5579 ¶111 n. 87 (relaxing certain ownership and attribution rules with respect to cellular operators’ participation in PCS to foster investment in DE ventures) (citation omitted).

<sup>109</sup> Wilco is one of the few African-American owned cable and telecommunications companies in the country. See Wilco Electronic Systems, *About Wilco*, available at <http://wilcoinc.com/about.html> (last visited Feb. 19, 2014). It is also a partner in NTIA’s BTOP Freedom Rings program in Philadelphia, a government, grassroots organization and private sector partnership whose objective is to bring broadband and computer skills to the millions of citizens that live in underserved or unserved poor urban communities.

profit that provides affordable internet through partnerships nationwide.<sup>110</sup> Mobile Citizen is also a part of the Connect to Compete partnership.

Notwithstanding its partnership with Clear, Wilco makes independent decisions about hiring, the pricing of its services to meet the unique needs of its community, how best to deploy its services and resources, and what partners to engage with. In Wilco's case, they would be a potential spectrum bidder, but do not have the capital nor time to purchase spectrum at auction or on the secondary market and then build it out without a strategic partnership or a joint venture relationship. This paper does not suggest that all DEs desire or will need to enter into strategic partnerships with larger incumbents and firms, but those that do should not be penalized. Moreover, where possible, the FCC should stimulate these partnerships where it makes sense in the negotiation of industry mergers and acquisitions.

## **VII. Nine Policy Recommendations to Advance Minority Spectrum Ownership**

It has been the inconsistency of the FCC's DE program, coupled with its impact on more promising opportunities like secondary market transactions that have impacted MBE engagement as licensees and spectrum-assets owners and managers. With the upcoming incentive spectrum auctions and the gradual release and bidding of existing and future inventories of advanced services spectrum, the FCC should reestablish an environment where incentives for MBE participation are encouraged and, where possible public interest conditions should be mandated.

This paper presents *nine* policy recommendations that can assist the FCC in facilitating measureable improvement in DE participation in upcoming auctions. Adopting these recommendations would go a long way toward eliminating the major market entry barriers that impede the ability of qualified new entrant DEs to raise *and* allocate capital in the most productive means possible and develop viable business plans that reflect common industry practices regarding the use of spectrum.

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<sup>110</sup> Wilco's 4G service is offered at \$14.95 per month, *a la carte* or bundled, and brings high-speed broadband to one of the lowest poverty areas in the city. It is only one of two providers offering affordable broadband to low income customers in its geographic area; the Comcast Internet Essentials program is the other alternative provider.

## 1. Eliminate the *Attributable Material Relationship Rule*.

DEs should be able to retain their DE status, including the value of bidding credits without having to attribute the revenues of other firms (large or small), despite entering into leasing, wholesaling, and/or resale arrangements for more than 25% of spectrum capacity to one entity. Wholesaling and leasing arrangements, in particular, are important vehicles for small and MBE new entrants to build capital and use that capital in the most efficient and productive means possible. It has become a standard and important industry practice given the dominance of national and regional carriers in the retail market.

Additionally, the FCC has recently clarified that it would review applications or proposed transactions that propose greater than 25% foreign ownership of broadcast stations on a case-by-case basis, stating that “a clear articulation of the Commissions approach to section 301(b)(4) in the broadcast context has the potential to spur new and increased opportunities for capitalization for broadcasters, and particularly for minority, female, small business entities, and new entrants.”<sup>111</sup> Significantly, this clarification will also help eliminate the disparity between foreign ownership of common carriers and that of broadcast stations.<sup>112</sup> How ironic that the FCC opens one door for increasing minority ownership in broadcasting – a door that has been virtually shut for 100 plus years – but it continues to keep a door to increased capital for wireless MBEs closed. It is very unfortunate that MBEs in the wireless industry may need to raise foreign capital instead of using readily available means of financing right here at home. It is time to level the regulatory playing field for DEs in leasing, reselling and wholesaling.

## 2. Increase bidding credits to at least 40%.

An increase would help compensate for the harms caused by the 2006 DE Rules and “counterbalance the tendency of auctions to concentrate license ownership in the hands of several very large companies.”<sup>113</sup> This is a nominal increase from the maximum 35% bidding credit level used in forty-five (45) previous auctions of varying bands and services, and comparable to the 40% and 45% bidding credit levels used in two previous auctions.<sup>114</sup>

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<sup>111</sup> Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licenses, MB Docket No. 13-350, Declaratory Ruling (rel. Nov. 14, 2013) at ¶10.

<sup>112</sup> *Id.* at ¶6; *see also id.*, Separate Statement of Commissioner Ajit Pai (“This disparity does not make any sense to me, and it harms our nation’s broadcasting industry. . . . I am therefore pleased that today’s Declaratory Ruling takes a much needed step towards leveling the regulatory playing field.”)

<sup>113</sup> *See Fifth R&O* at 5539 ¶15.

<sup>114</sup> Auctions #14 (WCS), #16 (800 MHz SMR), #18 (220 MHz), #20 (VHS Public Coast), #21 (LMS), #23 (LMDS Reauction), #24 (220 MHz), #25 (Closed Broadcast), #26 (929-931 Paging), #27 (Broadcast), #28 (Broadcast), #30 (39 GHz), #32 (New AM Broadcast Stations), #34 (800 MHz SMR (General), #36 (800 MHz SMR), #37 (FM Broadcast), #39 (VHF Public Coast & Location and Monitoring Service), #40 (Paging), #42 (Multiple Address System Spectrum), #43 (Multi-Radio Service), #44 (Lower 700 MHz Band), #45 (Cellular RSA), #48 (Lower and Upper Paging Bands), #49 (Lower 700 MHz Band), #53 (MVDDS), #54 (Closed Broadcast), #57 (Automated Maritime Telecommunications System), #59 (Multiple Address Systems), #60 (Lower 700 MHz Band), #61 (Automated Maritime Telecommunications System), #62 (FM Broadcast), #63 (MVDDS), #64 (Full Power TV), #68 (FM Broadcast), #70 (FM Broadcast), #72 (220 MHz), #79 (FM Broadcast), #81 (LPTV), #82 (New Analog TV), #85 (LPTV & TV Translator Digital Companion Channels), #86 (Broadband Radio Service), #87 (Lower & Upper Paging Bands), #88 (Closed Broadcast), #90 (VHF Commercial TV), and #91 (FM Broadcast) had 35%



Further, the equity and debt markets have become far more challenging since 2006, and no other viable DE incentives are currently available to potential bidders (e.g., “closed” license auctions that have been so central to historical DE success).

3. Reinstitute select DE-only closed spectrum auctions.

Doing so would level the playing field for DEs against large incumbents and well-financed new market entrants.

4. Incorporate diversity and inclusion in the Commission’s public interest analysis of mergers and acquisitions (“M&As”) and secondary market spectrum transactions.

Such analysis would ensure that there are compelling factors in the determination of whether any transaction meets the public interest standard, including MBE and WBE participation. Such documentation should also be a part of the agency’s annual Wireless Competition Report to Congress.

5. Conduct ongoing recordkeeping of DE performance.

The Commission should also retain specific information about the MBE and WBE status of bidders, in addition to the small business status, to accurately measure auction outcomes.

6. Complete the *Adarand* Studies, updating the Section 257 studies released in 2000.<sup>115</sup>

These studies should specifically detail market failures as defined by Section 257, and should include a comprehensive review of the successes or failures of the DE program as well as race-neutral measures to implement Section 309(j) since its inception.

7. Regularize procedural requirements.

Such action would ensure that future regulatory and policy changes are conducted with ample time for public notice and comment, with outreach to all types of DEs to ascertain the real-world impact of such changes, and with sufficient lead time for DEs to make any necessary adjustments to financing and business plans.

8. Conduct a substantive review of proposed DE rules.

Such review should also include a review of potential market entry barriers and of significant economic impacts on DEs for auction rules at the NPRM stage of the rulemaking process in compliance with the Regulatory Flexibility Act, as amended.<sup>116</sup>

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maximum bidding credits. Auction #3 (Regional Narrowband) and Auction #17 (LMDS), had maximum bidding credits at 40% and 45%, respectively. FCC auction archives and releases, [http://wireless.fcc.gov/auctions/default.htm?job=auctions\\_home](http://wireless.fcc.gov/auctions/default.htm?job=auctions_home) (last visited Feb. 1, 2014).

<sup>115</sup> See *supra* note 18.

<sup>116</sup> 5 U.S.C. §§601 *et seq.*; see also Rebecca Krafft, *President Obama Issues Executive Order To Improve Rule Review*, The Small Business Advocate, SBA Office of Advocacy, Vol. 30, No. 1, January – February 2011, reporting on Executive Order 13563, *Improving Regulation and Regulatory Review* (issued Jan. 18, 2011) (“The executive order directs federal agencies to enact procedures to review significant regulations on a regular basis in order to identify and revise those that have become ‘outmoded, insufficient, ineffective, or excessively burdensome.’”)



9. Support increased funding for & statutory amendments regarding the Telecommunications Development Fund.

Reinvigoration and reactivation of TDF can help support today's DEs, especially MBEs and WBEs, by providing financing consultation for auction participants, and support for and/or partnership with producing the FCC's *Adarand* studies required to meet constitutional strict scrutiny requirements. Section 714 of the 1996 Act also needs to be amended by Congress to relax its stringent debt requirements, and to permit TDF to earn interest not just from upfront auction deposits, but all auction payments to the U.S. Treasury.<sup>117</sup>

Recommendations #1, #2 and #4 - repealing the *Attributable Material Relationship Rule* and increasing DE bidding credits and incorporating diversity and inclusion in the Commission's public interest analysis of M&As and secondary market spectrum transactions - should be considered the highest priorities, to ensure that MBEs are not excluded from wholly participating in pending and future auctions. The FCC's action or inaction on these key recommendations will determine whether DEs can be fully engaged in upcoming auctions and secondary market transactions, plus whether MBEs can achieve the scale they'll need to become major competitors and innovators. These efforts would also help level the playing field to avoid a new form of 'ownership divide' in the wireless industry.<sup>118</sup>

Above all, the Commission should act expeditiously. If the FCC is ever to meet the historic goals of promoting MBEs and of ensuring the benefits of a diverse pool of wireless infrastructure owners or investors, it should assign the highest priority to DE program and secondary market reform. And irrespective of what changes the FCC should choose to adopt, the Commission should act with a sense of finality, since business certainty is necessary to foster robust investment and growth in the industry.

These recommendations, if implemented, would help the Commission reposition itself to comply with the statutory obligations set forth in Sections 257 and 309(j) of the Communications Act, as well as

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<sup>117</sup> See Trigg *TDF Article* at 203-05 (comparing the difference in TDF's ability to provide funding if it were not limited to interest earned on auction upfront deposits).

<sup>118</sup> Leonard M. Baynes, *The Other Digital Divide: Disparity in the Auction of Wireless Telecommunications*, 52 Cath. U.L. Rev. 53 (2003) at 351 (comparing the disparity between people of color and whites to access to computers and the Internet as reported by the US. Department of Commerce in its annual survey, *Falling Through the Net*, with fewer opportunities on average for spectrum ownership by minority groups than non-minority groups, notwithstanding race-based bidding credits).

the Regulatory Flexibility Act, in addition to the FCC's expressed interest in promoting greater diversity and increased competition in wireless licenses ownership.

### **VIII. Conclusion**

The FCC has a unique opportunity to promote the successful participation of MBEs in upcoming auctions and future private sector transactions consistent with the mandates of Congress and its own findings that meaningful participation by a diverse selection of service providers is in the public interest. To advance innovation and competition while fostering MBE participation in the wireless industry pursuant to its congressional mandate, the FCC should take all necessary steps to usher in changes or new policies that help, not hurt, MBE participation and success. Empowering these entities for success contributes economic opportunity to under-represented citizens and their communities, and ensures that the new digital economy is energized by the diversity of background, expertise and opportunity for all stakeholders.

Today, due to marketplace dynamics, long-standing market entry barriers and discriminatory practices, compounded by regulatory and legal impediments, MBE ownership of full power radio and TV stations is at its lowest in decades, and the number of MBE-owned cable systems is negligible, at best. Adopting the recommendations herein will help ensure that minority entrepreneurs in wireless spectrum ownership will thrive and maintain lasting institutions, to the great benefit of the nation.

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### **About the Authors**

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### **About the Minority Media and Telecommunications Council**

The Minority Media and Telecommunications Council (MMTC) is a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for minority advancement in communications. MMTC strongly believes that the breathtaking changes in communications technology and the new global forms of media partnerships must enhance diversity in the 21st century.